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In The
Supreme Court of The United States

OCTOBER TERM, A.D. 1963

No. 589

LEE DANFELSER and BYRDIS DANFELSER,
Petitioners,

vs.

STATE OF NEW MEXICO, ex rel.,
State Highway Commission of New Mexico,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT, STATE OF NEW MEXICO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW MEXICO

To: The Honorable Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States

Petition for Writ of Ceritorari to review final decision of the Supreme Court of the State of New Mexico rendered as a result of Motion for Rehearing on August 5, 1963, Mandate to the District Court of Bernalillo County, New Mexico, by the Clerk of the Supreme Court of New Mexico, August 26, 1963, reversing Lower Court. Majority and dissenting opinions. (See Appendix.)

I

STATEMENT OF MATTERS INVOLVED

Condemnation action filed by Respondent September 15, 1958, seeking acquisition of property and access rights for the construction of Interstate Project 1040-3(1)160, Section "A" Conorado Freeway. The condemnation action seeks the acquisition of land and access.

"Order Authorizing Immediate Entry and Acquisition and Control of Access" entered by the District Court of Bernalillo County, New Mexico, October 1, 1958.

Certified Transcript of Record accompanies this Petition in accordance with United States Supreme Court Rule 21.

II

JURISDICTIONAL STATEMENT

This cause involves compensation for the taking or damaging of access rights of abutting property owners on interstate highways constructed in accordance with the Federal Aid Highway Act as passed by Congress and is of importance to the public generally as well as to the parties to this cause. There is a conflict between decisions of the various states which should finally be settled by this Court. The cause involves the construction and implementing of State and Federal statutes and the provisions of the State and Federal Constitutions. Writ of Certiorari is filed in accordance with the provisions of United States Supreme Court Rule 19.

III

QUESTIONS PRESENTED FOR REVIEW

(a) The majority opinion offends Article II, Section 20 of the Constitution of the State of New Mexico and the Fifth

and Fourteenth Amendments to the Constitution of the United States. (See Appendix.)

(b) The majority opinion fails to accord full constitutional scope to Section 55-10-5, New Mexico Statutes, 1953, Volume 8, Part 2, providing for the acquisition of property and property rights; including *rights of access*, in condemnation suits. (See Appendix.)

(c) The majority opinion fails to accord full constitutional scope to Section 107, 23 U.S.C.A. Page 15, providing for acquisition of interests in lands including control of access by purchase, donation, condemnation or otherwise. (See Appendix.)

IV

STATEMENT OF THE CASE

The facts are stipulated and are briefly summarized as follows:

Prior to condemnation, Petitioners' land directly abutted on U. S. Highway 66 with a frontage of approximately 775 feet (Central Avenue within the City Limits, Albuquerque, New Mexico).

Market value of Petitioners' land after condemnation was reduced by taking of land and access; damages determined by appraiser's report.

Under the facts stipulated, the damage occasioned by loss of access was stated by appraiser's report to be $43,120.00.

The stipulation presented the following questions of law:

> "16. That the only questions remaining to be determined in this cause are questions of law as follows:
>
> "(1) Is the depreciation in the market value of Defendants' property which has been occasioned by the loss of access directly to the main travelled portion of

old U. S. 66 caused by a reasonable and valid exercise of police power and therefore non-compensable?

"(2) Does the construction of the two-way frontage road operate in complete mitigation of damages for loss of access?

"(3) Does the construction of the two-way frontage road operate in partial mitigation of damages for loss of access?

"(4) Under the facts and circumstances stipulated herein, are the damages which have been caused by the depreciation in market value of Defendants' property by reason of loss of access directly to the main travelled portion of old U. S. 66 compensable?"

Constitutional and statutory provisions were argued at length before the District Court, Bernalillo County, New Mexico, and before the New Mexico Supreme Court on appeal.

The Trial Court gave judgment for Respondent assessing damages for loss of access as stipulated and adopted the following conclusions of law:

"I

"That the depreciation in the market value of the Defendants' property, which has been occasioned by the loss of access directly to the main travelled portion of old U. S. 66 was in no way caused by a reasonable and valid exercise of police power and therefore the damage occasioned by said loss of access is compensable.

"II

"That the construction of the two-way frontage road does not operate to completely mitigate the damage for loss of access.

"III

"That the construction of the two-way frontage road does operate in partial mitigation of damages for loss of access.

"IV

"That under the facts and circumstances stipulated herein, the damages which have been caused by the depreciation in market value of Defendants' property by reason of loss of access directly to the main travelled portion of old U. S. 66 are compensable."

V

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Similar issues were before this Court in Martin vs. Creasy, 360 U.S. 219; 79 Sup. Ct. Rep. 1034; 3 L.ed 2nd 1186. At Page 1037 Justice Stewart states:

> "There is no reason to suppose that the commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property'. If after all is said and done in the Pennsylvania Court, any of the plaintiffs believe that the commonwealth has deprived them of their property without due process of law this Court will be here."

The issues involved should be finally decided by the Supreme Court of the United States since the rights and properties of all abutting property owners in all the states through which Federal aid controlled access highways are being constructed are affected. As the matter now stands, some states are compensating for loss of access, others are not. The interstate highways are being constructed with funds furnished by the Federal Government up to 90% of the cost.

Subsequent to the decision in Martin vs. Creasy, Supra, the case of Katherine S. Sullivan, Plaintiff vs. L. D. Wilson, State Highway Engineer and the State Highway Commissioner, et al, No. 4116 on the docket of the United States District Court for the District of New Mexico was heard by a three-judge court consisting of Judge Pickett, Judge Hatch and Judge Rogers. The Court cited the Martin vs. Creasy decision and stated:

> "* * * that this cause should be held in abeyance for a reasonable length of time during which the plaintiff shall exercise diligence in attempting to obtain a judgment from the State Courts of New Mexico on the matters presented herein."

As a result of this decision, the Plaintiff, Katherine S. Sullivan was by agreement with the State Highway Commission granted a slip-ramp access to her property and at this time, Mrs. Sullivan owns the only access on the limited access highway between Albuquerque and the Arizona State Line where construction has been initiated since 1956.

Furthermore, and by way of invoking the aid of the Supreme Court of the United States in resolving the question of compensability for the taking or impairment of access of an abutting owner, the State of Arizona held in Harris, ex-rel. Morrison vs. Thelberg, 350 Pac. 2nd 988, an abutting property owner's access could not be taken or damaged without just compensation.

The Court's attention is directed to the fact that in the States of California, Kansas, Washington, Idaho, Alabama, Georgia, Arizona, Minnesota and Mississippi, the taking or damaging of access has been held to be a compensable item.

VI

SUMMARY

(1) Access rights of an abutting property owner are property rights.

(2) Furnishing of frontage road does not constitute payment for such damage.

(3) "Reasonableness of access" and "circuity of travel" caused by substitution of frontage road are questions of fact considered by the fact finder in fixing damages.

(4) Petitioners' constitutional rights under New Mexico State Constitution and Fifth and Fourteenth Amendments of the United States Constitution have been invaded.

(5) New Mexico Statutes require access to be obtained by condemnation or purchase and not by exercise of police power.

(6) The majority opinion fails to accord full constitutional scope to statutory provisions of the State of New Mexico and of the United States.

WHEREFORE, Petitioners pray that Writ of Certiorari issue to review the judgment of the Supreme Court of the State of New Mexico in the above-entitled cause.

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Filed: August 5, 1963

In The
Supreme Court of The United States

STATE OF NEW MEXICO, et rel.
State Highway Commission of New Mexico,
Petitioner - Appellant,

vs. No. 7021

LEE DANFELSER and BYRDIS DANFELSER,
Defendants - Appellees.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
MACPHERSON, JR., Judge

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PER CURIAM.

In view of the motion for rehearing filed by appellees, supported by their brief, two exhaustive briefs filed by amici curiae, and appellant's brief in response thereto, the original opinion is withdrawn and the following substituted:

OPINION

CARMODY, Justice

The state appeals from a judgment in a condemnation action granting the defendants Danfelsers damages for loss of access to a highway.

The case was tried in the district court upon stipulation, from which the following appears:

The state acquired, by these condemnation proceedings, a strip of land owned by the defendants, 75 feet wide and about 770 feet long, comprising approximately 1.376 acres of land. The property taken formerly fronted upon the right-of-way of U. S. Highway 66.

Prior to the taking, there was direct access from the defendants' land to the easterly-bound traffic lanes of what is termed in the stipulation as "old U. S. Highway 66." The old highway was a four-laned road with a median divider, and there were no crossovers directly in front of defendants' property. It was stipulated that Highway 66 is now renumbered as Interstate 40 and that the condemnation was necessitated for the building of Interstate 40 and its merger with old U. S. Highway 66 at the easterly city limits of the city of Albuquerque. Interstate 40 was built somewhat to the north of defendants' property, but what was referred to as "old 66" remained substantially as it was, its being an extension of Central Avenue. However, at least at this location, it was made into a limited access road, so as to control access not only to it but to Interstate 40. The front portion of defendants' property was taken for the purpose of constructing a two-way frontage road, by which the defendants' property could connect with U. S. Highway 66 or Central Avenue on the west at an on-grade intersection, and to the east with a one-way connection ramp to reach Interstate 40. A chain-link fence was constructed, prohibiting traffic from entering upon the controlled-access highway except by way of the points of connection. The parties also stipulated that the defendants' land, both before and after the taking, was unimproved and that its highest and best use was potential commercial and that the market value of the lands remaining had been reduced by the loss of access directly to the main-traveled portion of old U. S. 66. It was agreed that the defendants were entitled to compensation for the land actually taken in the sum of $19,264.00, and that the defendants were entitled to $15,653.00 as compensation for drainage damages to the remaining lands; and those two items of damage were paid for by the state prior to the appeal.

In addition to the provisions of the stipulation which have

been summarized above, the two concluding paragraphs of the stipulation are as follows:

"16. That the only questions remaining to be determined in this cause are questions of law as follows:

"(1) Is the depreciation in the market value of Defendants' property which has been occasioned by the loss of access directly to the main travelled portion of old U. S. 66 caused by a reasonable and valid exercise of police power and therefore non-compensable?

"(2) Does the construction of the two-way frontage road operate in complete mitigation of damages for loss of access?

"(3) Does the construction of the two-way frontage road operate in partial mitigation of damages for loss of access?

"(4) Under the facts and circumstances stipulated herein, are the damages which have been caused by the depreciation in market value of Defendants' property by reason of loss of access directly to the main traveled portion of old U. S. 66 compensable?

"17. That if damages are recoverable by Defendants occasioned by loss of access to their lands, the amount of such damages is agreed to be $43,120.00."

The trial court, based upon the stipulation, adopted the following conclusions of law:

"I.

"That the depreciation in the market value of the Defendants' property, which has been occasioned by the loss of access directly to the main travelled portion of old U. S. 66 was in no way caused by a reasonable and valid exercise of police power and therefore the damage occasioned by said loss of access is compensable.

"II.

"That the construction of the two-way frontage road does not operate to completely mitigate the damage for loss of access.

"III.

"That the construction of the two-way frontage road does operate in partial mitigation of damages for loss of access.

"IV.

"That under the facts and circumstances stipulated herein, the damages which have been caused by the depreciation in market value of Defendants' property by reason of loss of access directly to the main travelled portion of old U. S. 66 are compensable."

The judgment granted to the defendants the amounts hereinabove mentioned for the taking of the land and the drainage damage, and in addition awarded the defendants the agreed amount of $43,120.00 by reason of the loss of access. This appeal relates solely to the award of damages for the loss of access to the defendants' remaining lands.

We are thus squarely faced with the question as to whether or not, under these facts, whatever damage was occasioned by loss of access is compensable. It is of importance to note that we are not here concerned with any limitation of access to Interstate 40, because the defendants' property does not border upon it — we are only dealing with the limited question of whether the defendants are entitled to damages because their former access to Highway 66 has been taken away and a portion of their property condemned for a frontage road so as to give them entrance and exit to the road upon which they formerly fronted.

The authorities are in hopeless conflict on this subject. It would seem that this is one phase of the law upon which

courts, sometimes even within the same jurisdiction, have adopted seemingly inconsistent views, and, in addition, in almost all of the cases, there are either vigorous dissents or special concurring opinions which join in the result only. There seems to be a radical difference in viewpoint among justices who have been required to rule upon the point. This conflict is so pronounced that most of the cases contain lengthy dissertations expounding the views of the author of the opinion or the dissent.

In an effort to avoid encumbering the law books to an additional extent, we propose to state the rules that are apparently followed in the jurisdictions which have determined the question, and thereafter announce our considered judgment as to what is the proper rule for the state of New Mexico, giving to the student, or those interested in the subject, some of the most outstanding authorities, texts and law review articles, which are cited in footnotes, for such examination as they may desire.

The "right of access" is apparently judge-made, the exact origin of which is difficult to determine.[1] Nevertheless, it is now considered a property right and may be loosely defined as the right of ingress to and egress from the property via

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FOOTNOTE 1

2 Nichols on Eminent Domain, 3d ed., §§ 6.4442 and 6.4443;
3 Nichols on Eminent Domain, 3d ed., §§ 10.22 and 10.221;
Jahr, Eminent Domain, ch. VIII §§ 47-65, at 68-91 (1953);
Elliott, Roads and Streets, §§ 297-299 at 358-363 (4th ed. 1926).
Also, helpful discussions are to be found in several law review articles or notes:
13 Mo. L. Rev. 19 (1948);
3 Stanford L. Rev. 298 (1950-51);
27 Wash. L. Rev. and St. Bar Journ. 111 (1952);
43 Iowa L. Rev. 258 (1957-58);
38 Neb. L. Rev. 407 (1959);
1939 Wash. U. L. Q. 310;
11 Baylor L. Rev. 149 (1959) — As a part of this article, the author has included a hypothetical problem, clearly illustrating a comparable situation to the instant case.
56 Northwestern L. Rev. 587 (1961).

the abutting street or highway. Generally speaking, all of the courts recognize such a right. There is also almost complete unanimity among the courts that traffic regulations, such as no-left-turns, one-way-street restrictions, and the like, are not an interference with the abutter's right of access. In addition to this limitation, practically all of the courts at least give "lip service" to the doctrine that the right of access is not compensably damaged by the *Diversion of traffic* or by *circuity of travel*. It is, however, with reference to the application of these latter two limitations that the courts seem to come to a parting of the way. Thus, some courts have held that although the landowner is not entitled to damages for diversion of traffic, nevertheless they have also held it proper for a witness to testify and a jury to consider that the value of the property has been decreased because the main stream of traffic no longer goes by the property involved. Other courts, on the contrary, take the view that the loss of the main stream of traffic and its effect on property values may not be considered. To us, there can be no middle ground. It is incongruous to say, on the one hand, that diversion of traffic is not a compensable item of damage, and, on the other, to allow the same to be considered as affecting values. Either the same should be considered for all purposes, or disregarded for all purposes.

Another disagreement appearing in the decisions relates to the police power of the state, some of the courts holding that the taking of access comes within the police power and is non-compensable, while others have determined that it is not within the limits of police power and must be compensated for in eminent domain. In view of our disposition of the problem, we do not feel that there need be any determination as to whether the instant case falls within or without the police power of the state.

Still another source of conflict among the courts is the fact that some have determined that the right of access, even though interfered with, is only compensable if a portion of the property owner's land is taken. We find this reasoning somewhat difficult to follow, because if the right of access is a property right, its loss will be just as severe and should be compensable, whether a portion of the condemnee's land is taken or not. No doubt, however, the courts which so hold are doing so upon the unstated ground that to allow compensation in all cases would be so burdensome that the state would be unable to continue its work. Be this as it may, the conclusion we reach will not require us to make such a hairline distinction.

The decisions of the courts seem to fall in three major categories:

(1) That any loss which results from being placed upon a frontage road is not to be compensated in eminent domain, whether land is taken or not.

(2) That any loss resulting from being placed on a

FOOTNOTE 2

Arkansas State Highway Commission v. Bingham (1960), 231 Ark. 934, 333 S.W. 2d 725;
Pennsavers Oil Co. v. State (Tex. 1960), 334 S.W. 2d 546;
Winn v. United States (9th Cir. 1959), 272 F. 2d 252 (but see Mabe v. State, Footnote 3);
Selig v. State, 1961, 10 N.Y. 2d 34, 217 N.Y.S. 2d 33, 176 N.E. 2d 59;
Darnall v. State (S.D. 1961), 108 N.W. 2d 201;
State ex rel. Merritt v. Linzell, 1955, 163 Ohio St. 97, 126 N.E. 2d 53;
Iowa State Highway Commission v. Smith, 1957, 248 Iowa 869, 82 N.W. 2d 755, 73 A.L.R. 2d 680.
See, also:
Nick v. State Highway Commission, 1960, 13 Wis. 2d 511, 109 N.W. 2d 74;
Robinett v. Price (1929), 74 Utah 512, 280 Pac. 736;
State, by and through State Highway Comm'n v. Burk, 1954, 200 Ore. 211, 265 P. 2d 785;
Department of Highways v. Jackson (Ky. 1957), 302 S.W. 2d 375;
Hillerege v. City of Scottsbluff, 1957, 164 Neb. 500, 83 N.W. 2d 76;
Holbrook v. State (Tex. 1962), 355 S.W. 2d 235;
Gayton v. Department of Highways (Colo. 1962), 367 P. 2d 899.

frontage road should be compensated, but the frontage road should be considered in mitigation.

(3) That any loss resulting from being placed upon a frontage road should be compensated only when accompanied by a taking of land and that the existence of a frontage road should be considered in mitigation.

As hereinbefore stated, the conflict among the decisions is basically concerned with whether the right of access is a limited one, or one which, in effect, gives the abutter a superior right to that of the public. If the abutter has a private easement to the highway, other than reasonable access thereto, it must have been reserved by prior deed, or have attached by virtue of statute or decision. We know of no such statute or decision granting such a preference to an abutter under the facts here present, and, from the record in this case, no such right was apparently reserved. The question, then, is, should this court, by judicial decision, grant to an abutter a greater interest in the fee of a highway than the abutter has to other land owned by the state? See, 3 Nichols on Eminent Domain, § 10.221 (5). From a policy standpoint, we see no reason why the state's ownership of the fee is not paramount to any claimed servitude occurring merely by virtue of fortunate location.

FOOTNOTE 3:

People v. Ricciardi, 1944, 23 Cal. 2d 390, 144 P. 2d 799;
Riddle v. State Highway Commission, 1959, 184 Kan. 603, 339 P. 2d 301;
McMoran v. State, 1959, 55 Wash. 2d 37, 345 P. 2d 598;
Mabe v. State (Idaho 1961), 360 P. 2d 799 (but see Wanf v. United States, Footnote 2);
Blount County v. McPherson, 1958, 268 Ala. 133, 105 So. 2d 117;
Clayton County v. Billups Eastern Petroleum Co., 1961, 104 Ga. App. 778, 123 S.E. 2d 187;
State v. Hollis, 1963, 93 Ariz. 200, 379 P. 2d 750;
Hendrickson v. State of Minnesota, No. 38692, Supreme Court of Minn., May 3, 1963 (not yet reported).

FOOTNOTE 4:

State v. Thelberg, 1960, 87 Ariz. 318, 350 P. 2d 988 (but compare prior opinion at 344 P. 2d 1015);
State v. Lynch (Mo. 1956), 297 S.W. 2d 400;
State Highway Commission v. Finch, 1959, 237 Miss. 314, 114 So. 2d 673.

It is asserted that certain prior decisions of this court are controlling. We cannot agree. Without extending this opinion, unduly, we observe that the New Mexico Railroad Company case and the Bennett case are clearly distinguishable, because, in each, there was a total deprivation of access and failure to provide reasonable access to the general highway system. Weatherly dealt merely with a procedural question and is in no sense controlling here, and Harris related to a change of grade as it affected access and is not in point under the facts in this case. With regard to Sullivan v. Wilson, that decision requires that we give full constitutional scope to the Access Condemnation Statute of 1957, and this is exactly what we are attempting to do in this decision.

It is vigorously urged that the Access Condemnation Statute is a mandatory provision of our law. With such a construction we disagree, believing that the statute was merely enabling legislation, designed to permit the highway commission to meet standards required by federal law, and that it is permissive, not mandatory.

We fully recognize that loss of direct access and the requirement of unreasonable circuity of travel may in some instances be compensable, even when any consideration of the flow of public travel is eliminated. Nevertheless, in the instant case, we are of the opinion that, in law, there is no unreasonable interference with appellees' access, *nor do*

FOOTNOTE 5:

New Mexico Railroad Co. v. Hendricks, 1892, 6 N.M. 611, 30 Pac. 901;
Bennett v. Nations, 1945, 49 N.M. 389, 164 P. 2d 1019;
State v. Weatherly, 1960, 67 N.M. 97, 352 P. 2d 1010;
Board of County Com'rs, Lincoln Co. v. Harris, 1961, 69 N.M. 315, 366 P. 2d 710;
New Mexico district court three-judge decision, Sullivan v. Wilson, No. 4116 (June 20, 1959) (Not reported).

FOOTNOTE 6.

Sec. 55-10-1, et seq., N.M.S.A. 1953.